NO. 41719-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RUSSELL O'BRIEN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki Hogan

No. 07-1-05394-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. As the record provides no evidence that the State and defendant agreed to anything other than the sentence imposed, did the sentencing court act within its discretion when it denied defendant's motion to "correct" his judgment and sentence?

2. Should the court summarily reject defendant's claim that the trial court erred when it allegedly failed to hold an evidentiary hearing as it properly held a hearing pursuant to CrR 7.8 during which defendant presented no evidence?

3. Should the Court of Appeals deny defendant's request for a new hearing to withdraw his plea of guilty as the issue was not an issue properly brought before the sentencing court below and statute prohibits parties from making collateral attacks on a facially valid judgment more than a year after the judgment is made final?

B. STATEMENT OF THE CASE.

1. Procedure

On October 19, 2007, the State charged Russell O'Brien (hereinafter "defendant") with two counts of burglary in the second degree and one count of attempted burglary in the second degree. CP 1-2. Pursuant to a plea agreement with defendant, the State amended the information on December 17, 2007, charging defendant with a single

count of burglary in the second degree. CP 4. Defendant entered a plea of guilty to the amended information. CP 6-14.

At a sentencing hearing on December 17, 2007, the State recommended 60 months confinement per the plea agreement. CP 75. The State also recommended restitution concurrent with defendant's revoked DOSA. CP 75. Defense counsel did not object to the State's recommendation but did recommend the court impose minimal legal financial obligations on defendant and provide him an opportunity to seek drug addiction treatment. CP 75-76. Defense counsel did not ask the court to impose an exceptional sentence downward. CP 75-76.

The court imposed 60 months confinement with 60 days credit for time served. CP 77. The court did not impose an exceptional sentence. CP 77-78. Defendant's judgment and sentence specifically states: "The sentence herein shall run consecutively to all felony sentences in other causes numbers prior to the commission of the crime(s) being sentenced." CP 15-26. The sentencing court made no change to the judgment and sentence to indicate anything contrary to that statement. CP 15-26. Both defendant and defense counsel signed the judgment and sentence, acknowledging the imposed sentence. CP 24.

On February 11, 2008, defendant sent a letter to Superior Court in which he asked the court to inform the Department of Corrections that his current sentence should run concurrent to his revoked DOSA sentence.

CP 30-32. The court informed defendant that it did not act on ex-parte letters. CP 29.

On November 13, 2009, defendant filed a motion for relief from judgment and sentence with the court, claiming that in his plea agreement he and the State had agreed to concurrent sentencing for the burglary charge with his revoked DOSA. CP 35-37. He filed an additional motion on February 8, 2010, raising the same claim. CP 42-46. He sent a letter to the court on March 16, 2010, requesting an update on the status of his motion. CP 47-48. On November 8, 2010, defense counsel filed a motion with the court to correct the judgment and sentence. CP 49-50.

The sentencing court held a hearing on the post-judgment motion on December 17, 2010. RP 3-10. Defense counsel argued before the court that the judgment and sentence had been entered in error and that the sentence had been intended to run concurrent with the revoked DOSA sentence. RP 3-5. The State argued that the sentence would have run consecutive pursuant to RCW 9.94A.589 and that at the original sentencing neither attorney nor the court made any reference that the sentence should be run concurrent to the revoked DOSA. RP 5-7. Hearing argument from both sides, the court denied defendant's motion to correct the judgment and sentence. RP 8-9; CP 103.

Defendant filed an untimely notice of appeal on January 21, 2011. CP 104-105.

C. ARGUMENT.

1. THE SENTENCING COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTION TO MODIFY HIS JUDGMENT AND SENTENCE AS THE RECORD DOES NOT SUPPORT DEFENDANT'S ARGUMENT AND HE FAILED TO PRESENT ANY ADDITIONAL EVIDENCE IN SUPPORT OF IT.

RAP 2.2(9), (10) allows a party to appeal an order granting or denying a motion for amendment or vacation of judgment. "We review a CrR 7.8 ruling for an abuse of discretion, and we will not reverse a denial absent an abuse of discretion." ***State v. Pierce***, 155 Wn. App. 701, 710, 230 P.3d 237 (2010) (citing ***State v. Swan***, 114 Wn.2d 613, 642, 790 P.2d 610 (1990)). "We find such abuse only on a clear showing that the discretion exercised was manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." ***City of Tacoma v. Cornell***, 116 Wn. App. 165, 168, 64 P.3d 674 (2003) (citing ***State ex rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

When a defendant requests vacation of a judgment, the court shall "transfer a motion ... to the Court of Appeals for consideration as a personal restraint petition unless the court determines that ... resolution of the motion will require a factual hearing." CrR 7.8. At a hearing for post-conviction relief from judgment, the moving party has the burden of showing that by a preponderance of the evidence the original judgment had been done in error. ***State v. Holley***, 75 Wn. App. 191, 200 n.4, 876

P.2d 973 (1994) (citing ***State v. Davis***, 25 Wn. App. 134, 138, 605 P.2d 359 (1980)).

Defendant filed a motion to "correct" the judgment and sentence on November 8, 2010. CP 49-50. Attached to the motion were copies of the sentencing transcript, the judgment and sentence, and defendant's statement on plea of guilty. CP 51-102. After receiving defendant's motion, the court held a hearing on December 17, 2010. RP 3-10. At the hearing, defendant presented no evidence beyond what had been attached to the motion. RP 3-8. Defense counsel did not provide a deposition nor testify as to the alleged facts of the matter. RP 3-8. Defendant did not testify nor did he provide an affidavit to the court alleging any facts in the matter. RP 3-10. The court considered the arguments of both parties and, in light of the record, denied defendant's motion. RP 8-10; CP 103.

a. <u>The record before the court does not support defendant's claim that the State agreed to recommend concurrent sentencing.</u>

When a criminal defendant pleads guilty pursuant to a plea agreement, a written statement of the agreement shall be filed with the court. CrR 4.2(g). The nature of the plea agreement and any reasons for that agreement must be made part of the court record when the defendant enters his plea. RCW 9.94A.431(1); CrR 4.2(e). "A plea agreement functions as a contract in which the defendant exchanges his guilty plea for some bargained-for concession from the State: dropping of charges, a

sentencing recommendation, etc." ***State v. Barber***, 170 Wn.2d 854, 859, 248 P.3d 494 (2011).

Here, defendant argues that the State had agreed to make his sentence concurrent with the sentence for his revoked DOSA. App. Br. at 7-8; RP 3-4. The statement of defendant on plea of guilty submitted to the court does not specify concurrent sentencing of the current charge with the revoked DOSA. CP 6-14. Specifically, the statement indicates

> The prosecuting attorney will make the following recommendation to the judge: 60 months in custody, credit for 60 days served $200 costs, $500 CVPA, $100 DNA saple [sic] $400 DAC recoup, restitution concurrent with 05-1-06126-1, 05-1-05591-1, and 05-1-05727-2[.]

CP 9. Although defendant argues that the language is ambiguous, the most reasonable interpretation would be that the word "concurrent" applies only to the restitution and legal financial obligations instead of, as defendant suggests, the entire statement.

The transcript of the original sentencing hearing further supports the position that the prosecutor acted in accordance with the plea agreement at sentencing. At the hearing, the prosecutor recommended the sentence as written in the statement on plea of guilty; he did not recommend concurrent sentencing. CP 72-79 (Verbatim Report of Proceedings 12/17/2007 3-10). He did emphasize to the court that restitution would be concurrent with the previous convictions. CP 75 (RP 12/17/2007 6). "[T]here was a DOSSA [sic] that was revoked, Your

Honor, so the restitution would be concurrent with the restitution that was ordered in the DOSSA [sic] revocation." CP 75 (RP 12/17/2007 6). Neither defense counsel nor defendant objected to the State's recommendation nor make mention of an intent to make the sentences concurrent. CP 75-76 (RP 12/17/2007 6-7). Further, defense counsel made no recommendation to the court at the sentencing hearing; defense counsel merely requested leniency in legal financial obligations imposed upon defendant. CP 75-76 (RP 12/17/2007 6-7).

During the plea colloquy, the sentencing court asked defendant if he understood that "the prosecutor is going to be recommending 60 months in custody, as well as the legal financial obligations concurrent with three other cause numbers...?" CP 74 (RP 12/17/2007 5). Defendant indicated that he understood and asked no questions about the concurrent aspect of the agreement relating only to legal financial obligations. *Id.* Neither party addressed any of the legal issues involved if the court were to impose the current sentence concurrent with the prior sentence. CP 72-79 (RP 12/17/2007 3-10). In sentencing defendant, the court did not impose a concurrent sentence. CP 77-78 (RP 12/17/2007 8-9); CP 15-26.

Both defendant and defense counsel signed the judgment and sentence which had standard language clearly indicating that this sentence would run consecutive to previous existing sentences, but added language to impose concurrent restitution. CP 15-26. The judgment and sentence stated that:

> The sentence herein shall run consecutively to all felony sentences in other causes numbers prior to the commission of the crime(s) being sentenced.

CP 15-26. The court had no substantive evidence to indicate that the sentence imposed was not the sentence to which defendant had agreed. Defense counsel's arguments during the CrR 7.8 hearing were insufficient to convince the court otherwise.

Defendant failed to provide any evidence to substantiate his claim that the State had agreed to recommend concurrent sentencing. Given the record below, the sentencing court properly denied defendant's motion to adjust his judgment and sentence.

b. The sentencing court did not take any of the steps necessary to impose an exceptional sentence such as that suggested by defendant, further rebutting defendant's claim.

As part of a plea agreement, the prosecutor can agree to recommend an exceptional sentence to the sentencing court. When a court imposes an exceptional sentence, the court must find "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. "When a sentencing court goes outside the guidelines, there must be substantial and compelling reasons given." ***State v. Vance***, 49 Wn. App. 847, 850, 746 P.2d 349 (1987) (citing former RCW 9.94A.120(2)). *See* RCW 9.94A.535. The court must enter findings of fact and conclusions of

law properly citing those substantial and compelling reasons that justify an exceptional sentence. RCW 9.94A.535.

"[W]henever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms." RCW 9.94A.589(2)(a). Sentence of confinement imposed while under sentence for an earlier conviction are normally imposed consecutive to the original, beginning after the criminal defendant complete the first term of confinement. *Id.* "A departure from the standards in RCW 9.94A.589(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section[.]" RCW 9.94A.535.

At the sentencing hearing on December 17, 2007, defendant was under sentence for three counts of burglary imposed on June 7, 2006, sentenced as a DOSA. CP 18; RP 6. During the hearing, the prosecutor and defense counsel addressed the fact that defendant also had his revoked DOSA from the prior burglary convictions. CP 72-79 (RP 12/17/2007 3-10). Thus, although the court could have imposed concurrent sentences in this case, such a sentence would be an exceptional sentence subject to the limitations of RCW 9.94A.535. During the sentencing hearing, neither party made mention of any such exceptional sentence nor did they comply with any of the actions required of RCW 9.94A.535. CP 72-79 (RP 12/17/2007 3-10).

A defendant's stipulation to an exceptional sentence pursuant to a plea agreement can be used to show reason to justify an exceptional sentence. ***In re Breedlove***, 138 Wn.2d 298, 310, 979 P.2d 417 (1999). However, when a plea agreement involves an exceptional sentence, the sentencing court may choose to impose a standard sentence in lieu of the exceptional sentence. ***State v. Vance***, 49 Wn. App. at 850. Here, defendant made no such stipulation to the court. In addition, the sentencing court entered no findings of fact or conclusions of law as required by RCW 9.94A.535. All of these factors support the notion that the sentencing court, at time of original sentencing, had neither knowledge nor intent to impose an exceptional sentence on defendant.

Defendant presented no evidence to the sentencing court showing that the State agreed to recommend his current sentence be imposed concurrently to his prior felony conviction. At defendant's motion, the court reviewed the transcripts and relevant paperwork and found nothing to support his unsupported assertion. Thus, the sentencing court did not abuse its discretion when it denied defendant's motion to correct his judgment and sentence.

2. DEFENDANT'S CLAIM FOR AN EVIDENTIARY HEARING SHOULD BE DISMISSED AS THE SENTENCING COURT PROPERLY HELD A HEARING AT WHICH DEFENDANT PRESENTED NO EVIDENCE OTHER THAN THE UNSUBSTANTIATED STATEMENTS OF DEFENSE COUNSEL.

When a defendant requests vacation of a judgment, the court shall "transfer a motion ... to the Court of Appeals for consideration as a personal restraint petition unless the court determines that ... resolution of the motion will require a factual hearing." CrR 7.8. After receiving defendant's motion, the court held a hearing on December 17, 2010 to hear argument and examine evidence presented by defendant and the State regarding the potential vacation or modification of his judgment. RP 3-10.

The court gave defendant a hearing in response to his motion pursuant to CrR 7.8. At the hearing, defendant presented no evidence support his motion. RP 3-8. In considering defendant's motion, the court had nothing more than non-testimonial statements by defense counsel and transcripts from the sentencing hearing. RP 3-10. The court considered the arguments of both parties and, in light of the evidence, denied defendant's motion. RP 8-10; CP 103. Thus, defendant's argument that the court erred in not holding an evidentiary hearing is unsubstantiated and should be denied since the court properly held a hearing at which defendant failed to present evidence.

3. THE COURT SHOULD DENY DEFENDANT'S REQUEST FOR A NEW HEARING TO WITHDRAW HIS PLEA OF GUILTY AS THE ISSUE IS NOT PROPERLY BEFORE THE COURT AND DEFENDANT WOULD HAVE TO DEMONSTRATE THE CLAIM WAS NOT TIME BARRED BEFORE IT COULD BE CONSIDERED.

A defendant may challenge the voluntariness of his plea for the first time on appeal under certain, specific circumstances. RAP 2.4 delineates the Court of Appeals' scope of review. "The appellate court will, at the instance of the appellant, review the *decision or parts of the decision designated in the notice of appeal* or ... other decisions in the case as provided in sections (b), (c), (d), and (e)." RAP 2.4(a) (emphasis added). Concerning decisions not specified in the notice of appeal, RAP 2.4(c) provides that the Court of Appeals will only review a final judgment not designated on appeal if the notice "designates an order deciding a timely posttrial motion based on ... (4) CrR 7.4 (arrest of judgment), or (5) CrR 7.5 (new trial)."

Defendant filed his notice of appeal from the denial of a CrR 7.8 motion that was conducted four years after the judgment was entered. He did not file a direct appeal from the entry of his judgment. As his current appeal is not based on a CrR 7.4 or CrR 7.5 motion, this means that his notice of appeal did not bring up the underlying judgment. The only ruling before this court is the denial of the post-judgment CrR 7.8 motion.

When an appellant appeals a lower court's refusal to vacate a judgment, "[t]he *sole issue* is whether the trial court manifestly abused its discretion." ***Jones v. Canyon Ranch Associates***, 19 Wn. App. 271, 272, 574 P.2d 1216 (1978) (emphasis added). In ***Jones***, the appellant on appeal presented argument regarding the original judgment. The Court of Appeals, in finding that the lower court did not abuse its discretion, observed that the appellant's argument "may have been persuasive on appeal from the entry of the default judgment; however, the defendant did not timely seek review of that judgment[.]" ***Jones***, 19 Wn. App. at 274. As with ***Jones***, the issue before the court is the lower court's order refusing to vacate or modify the judgment and not the original judgment in question.

For an issue regarding a motion to withdraw a plea to properly be before the Court of Appeals, defendant would have had to raise the issue in his CrR 7.8 motion in the lower court. A defendant may move to withdraw a guilty plea under specific circumstances. CrR 4.2(f) ("The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.").

Defendant could have appealed the voluntariness of his plea if had filed a notice of appeal from the original judgment. The Washington Supreme Court has held that a certain circumstances allow a defendant to raise the voluntariness of a plea for the first time on appeal. ***State v.***

Mendoza, 157 Wn.2d 582, 589, 141 P.3d 49 (2006) (citing ***State v. Walsh***, 143 Wn.2d 1, 7-8, 17 P.3d 591 (2001)). However, in both ***Walsh*** and ***Mendoza***, the defendants filed a notice of appeal from the final judgment, raising the issue of voluntariness of the guilty plea and demanding an opportunity to withdraw the plea of guilty. ***Mendoza***, 157 Wn.2d at 585-86; ***Walsh***, 143 Wn.2d at 5.

Here, unlike ***Walsh*** and ***Mendoza***, defendant did not raise the issue of voluntariness of the plea in an appeal from the original judgment. Furthermore, defendant knew the circumstances of the plea agreement and the sentence when he filed his CrR 7.8. Defendant had an opportunity to raise this issue in his CrR 7.8 motion and hearing armed with the full knowledge of what result his plea of guilty had. However, his motion only addressed "correcting" the original judgment and sentence and is silent as to any intent by defendant to withdraw his plea of guilty. CP 49-102; RP 3-10.

Like ***Jones***, defendant can only appeal the lower court's decision to deny the motion to "correct" the sentence. Defendant cannot request to withdraw his plea of guilty for the first time on appeal as it falls outside of the appropriate scope of review of his appeal per RAP 2.4. Therefore, the court should refuse to consider defendant's request for a hearing to withdraw his plea of guilty as he has never filed a motion to withdraw his plea. Before defendant could bring such a motion he would have to show that it was not time barred under RCW 10.73.090. ("No petition or motion

for collateral attack on a judgment and sentence in a criminal case may be filed more than *one year after the judgment becomes final* if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.") (emphasis added). The statute defines a collateral attack as "any form of postconviction relief other than a direct appeal." RCW 10.73.090(2). This includes "a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment." *Id.* Therefore, defendant's request to have another hearing to deny his plea of guilty should be denied as it was not properly before the court and defendant has failed to demonstrate that such a claim is not time barred.

D. CONCLUSION.

Defendant properly filed a motion with the court, requesting modification of his judgment and sentence. The court held a hearing during which defendant failed to present competent evidence to support his claim. The court did not err when it denied defendant's motion.

Further, defendant's request for a new hearing to withdraw his plea of guilty is not properly before this court and appears to be barred by statute. The State asks that the court affirm the judgment of the court below.

DATED: November 8, 2011

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Rule 9

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The undersigned certifies that on this day she delivered by ~~U.S. mail~~ e-file or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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